

## VOTE EXPLANATION

• Mr. KERRY. Mr. President, I was necessarily absent for the cloture vote on the motion to proceed to legislation to provide civilian payroll tax relief, to reduce the Federal budget deficit, and for other purposes, S. 1931. If I were able to attend today's session, I would have opposed cloture on this bill.●

## MORNING BUSINESS

Mr. REID. Mr. President, I ask unanimous consent that we move to a period of morning business, with Senators allowed to speak up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

## EXECUTIVE SESSION

# NOMINATION OF CAITLIN JOAN HALLIGAN TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. REID. Mr. President, I move to proceed to executive session to consider Calendar No. 43, and I send a cloture motion to the desk. In fact, it is at the desk.

## CLOTURE MOTION

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative clerk read as follows:

## CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close debate on the nomination of Caitlin Joan Halligan, of New York, to be United States Circuit Judge for the District of Columbia Circuit.

Harry Reid, Patrick J. Leahy, Charles E. Schumer, Christopher A. Coons, Amy Klobuchar, Al Franken, Richard Blumenthal, Sheldon Whitehouse, Richard J. Durbin, Dianne Feinstein, Herb Kohl, Kirsten E. Gillibrand, Tom Udall, Ron Wyden, Robert P. Casey, Jr., Sherrod Brown, Jeanne Shaheen.

Mr. REID. Mr. President, I ask unanimous consent that on Tuesday, December 6, 2011, at 11 a.m., the Senate proceed to executive session to consider Calendar No. 43; that there be 1 hour for debate, equally divided in the usual form prior to the cloture vote; further, that the mandatory quorum under rule XXII be waived.

The PRESIDING OFFICER. Without objection, it is so ordered.

## LEGISLATIVE SESSION

Mr. REID. Mr. President, I now ask unanimous consent to resume legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Kansas.

## PAYROLL TAX HOLIDAY

Mr. MORAN. Mr. President, just a few moments ago we cast several votes in regard to the so-called payroll tax holiday. I opposed both the Republican amendment and the Democratic amendment.

There were significant differences between these two versions of this legislation; in part, the differences at least included the way that the provisions were paid for. While I may support the pay-fors, I objected to what the pay-fors are paying for.

I support freezing the pay of Members of Congress, the elimination of certain benefits to millionaires, and reducing the Federal workforce. But wouldn't we be better using the proceeds of these reductions in spending to reduce the debt and deficit rather than a short-term change that reduces the revenues going to the Social Security and Medicare trust funds? When are we going to admit we are broke?

I am reminded of a plan approved by Congress just several years ago where we borrowed money to give citizens a \$600 rebate, all in the name of a stimulus. We wanted to stimulate the economy and, in my view, what we did was we stimulated little and increased the debt a lot.

Many of us have expressed support for the concepts contained in the Bowles-Simpson deficit reduction plan. Their recommendations are very important and we have paid a lot of attention to them and expressed our desire to proceed in that way. Many times we have said that. But the legislation we just voted on uses many of their suggested reductions in spending, not for deficit reduction but for another stimulus plan. The Bowles-Simpson plan has been hijacked once again in the name of stimulating the economy.

These proposals also undermine the foundation of Social Security. We are reducing the payments into the trust fund. We should leave the trust fund alone and cut spending and use those savings to pay down our annual deficits and live within our means. Once again, we are putting off difficult decisions and leaving it up to our children and grandchildren to pay for our irresponsibility.

Finally, let me, once again, on this floor make the case for certainty in our Tax Code. Congress is tinkering tonight with the Tax Code, creating greater uncertainty. In almost every conversation I have with a business owner, they ask for certainty in the Tax Code and certainty in the regulatory environment. But instead, tonight we are changing or attempting to change the Tax Code one more time, for a short period of time, claiming some benefit for doing so. Instead, we should focus on long-term tax policy and a Tax Code that is simpler and certain. Certainty is something that will create jobs.

I expect there to be some criticism of the votes I just cast, and I can hear the

campaign sound bites. But we have to get beyond the next election and get to the next generation.

I yield the floor.

The PRESIDING OFFICER. The Senator from Oregon.

## DEFENSE AUTHORIZATION

Mr. MERKLEY. Mr. President, tonight, I voted against final passage of the Defense authorization bill, and I rise now to explain why I voted against it and the considerable concerns I have about the vast expansion of the powers of detention of American citizens that were contained in that bill.

These provisions related to the detention of American citizens—without the standard rights of the fifth and sixth amendment—have been an object of intense debate on the floor of the Senate over the last several days.

As a Senator who has now been here 3 years, I can say unequivocally that this debate was extremely valuable. Folks came from both parties on both sides of this issue and shared their insights, both from their life experiences, from their scholarly knowledge of the law, and certainly from their philosophy, and I commend all who participated in that debate. I listened to a great deal of that debate on both sides. I thought this was extraordinarily important; issues surrounding our Bill of Rights and the rights of American citizens, protection from the abuse of power.

Some came to this floor and said that essentially the detention provisions in this bill simply clarify existing law and will enhance our national security, and they did so with sincere hearts and sharp minds. Others came, equally sincere, equally learned, and argued the opposite side; that the detention provisions in this bill constitute a devastating circumvention of the fifth amendment right to due process and the sixth amendment right to a speedy trial by impartial jury, as well as a sixth amendment right to confront the witnesses against him or her. Maybe it is useful to take a look at what the fifth and sixth amendments actually say.

One of the last clauses of the fifth amendment notes that:

No person shall be deprived of life, liberty, or property without due process of law.

I think we all grow up in this country absolutely believing in this fundamental value that the government cannot take from you your life, your liberty or your property without the process of law.

The sixth amendment notes that, in prosecutions, the accused shall enjoy the right to a speedy and public trial—and I emphasize public trial—by an impartial jury of the state. It goes on to note that the accused shall be able to confront the witnesses against him and to have the assistance of counsel. So these basic issues of speedy and public trial, an impartial jury, the assistance of counsel, and the ability to confront

the witnesses against you, all of these are contained in the sixth amendment and all relevant to this debate over detention.

Most of this conversation is about a section of the bill called section 1031, subtitle D, and it is referenced subtitle D, "Detainee Matters." I will just read the title of the section to give a sense of what this is all about.

Section 1031. Affirmation of authority of the Armed Forces of the United States to detain covered persons pursuant to the authorization of the use of military force.

It uses this fancy word "covered persons," and it is what is referred to in everyday speech as enemy combatants. So section 1031 is about the ability of the Armed Forces to detain enemy combatants.

The reason this is framed this way is that there is a historical exception under constitutional findings of the Supreme Court to amendment five and amendment six of the Constitution. That exception is that if an individual is fighting on the side of the enemy against the United States, they do not have the same rights because they are now an enemy combatant in time of war, and they can be detained for the duration of that conflict. This was adjudicated in World War II over individuals who assisted with sabotage in New York, and it was found that the standard rights of speedy public trial, trial by jury, right to counsel do not apply if you are an enemy combatant. Instead, you are put into the framework of a war setting to be treated as a member of the opposing army.

So this exception has historically been extremely narrow. You are on the battlefield or you are directly working as a member of the enemy force against the United States. It should be extremely narrow, and it should be substantial hurdles for the State to be able to simply claim that you are an enemy combatant and thereby strip you of your fifth and sixth amendment rights.

But what we have in this bill, in section 1031, is not this narrow set of provisions based on the historical understanding of an enemy combatant. Instead, we have a definition that says "a person who was a part or substantially supported al-Qaida, the Taliban, or associated forces, engaged in hostilities against the U.S. or coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of enemy forces."

On first reading, it may sound as if that individual is directly involved in combat, but listen to the words embedded in this. First of all, it says "a part of," with no conception of what "a part of" means. Did you write one sympathetic e-mail in your lifetime? Does that make you "a part of"? We have no standard here.

"Substantially supported" is understood to mean material support, but no contingency for intent. If you donated money to a charity and that charity

used it to support Taliban activities somewhere in the world or some other group that had an association with the Taliban, you have substantially supported, under this conversation.

Then it says "the U.S. or its coalition partners." Who are these coalition partners? What is the definition of that? A few weeks ago, you might have noticed in the news that there were a lot of protests going on in Bahrain. We have a military facility in Bahrain. Is Bahrain a coalition partner since we utilize a partnership with them to supply our forces in the Middle East? Yes, probably so, because there is no definition of "coalition partner." With individuals who were standing up for human rights and got into a battle with police in a public square, they are engaging in a belligerent act against a coalition partner.

I hope you can start to see that the standard understanding that has been constitutionally established over time is completely taken apart in this simple paragraph. That should be of grave concern to all Americans who care about our constitutional rights to a fair hearing.

What happens when the government suspects you have done something? I want to take you to a case in Oregon. We had a case regarding an individual named Brandon Mayfield. Brandon Mayfield was born in Kansas. Brandon Mayfield got his law degree in Topeka, KS. Brandon Mayfield is an Army veteran. Brandon Mayfield is married with three children and lives with family in a Topeka suburb.

Brandon Mayfield is a Muslim convert, and in 2004 FBI agents raided his law office, his home, and his family farm to collect evidence, believing he was a terror mastermind behind the Madrid bombings. The reason why is an FBI agent concluded that a partial fingerprint matched Brandon Mayfield's fingerprint. Under this framework, the government now labels him an enemy combatant, and what right does Brandon Mayfield have to contest this? Basically, no rights. The law provides only that there will be a hearing; that the rules of the hearing will be set by the executive branch—by the President, if you will; that the attorney will be assigned by the executive branch; that the rules of evidence will be determined by the executive branch; that this hearing will occur sometime—but when? We don't know. There is no right to a speedy trial, there is no commitment that it will be public; in other words, no protections from the force of the State whatsoever—completely the opposite.

This gateway around the fifth and sixth amendments is very loosely defined rather than tightly defined. The entire process by which an individual might try to say "You are wrong, that was not me, I was not there" is extraordinarily without powers for the defendant.

I find that outrageous because once that hearing occurs, possibly in secret

without an attorney that the individual would like to employ, without rights to evidence, without an ability to confront the witnesses against him or her—without any of these rights, that person can now be locked away forever under this law. There is no right to appeal, no right to contest, and therefore this completely works against the principles we hold dear. Those principles were set up—the fifth amendment and sixth amendments were set up to defend us against the overreach of an executive branch. Yet tonight we have stripped away those protections.

A lot of the conversation over the last few days has noted that there was a historical gate through which you did not have the fifth and sixth amendment but also recognized how narrow that was. What we have done today changes that.

I hope this continues to receive substantial attention. I would have hoped there would be hearings about this phenomenal change in U.S. law adopted tonight because this sort of thing should not be done lightly. It should not be placed at the last second into a Defense authorization bill without extensive consideration, extensive testimony by experts on all sides of this issue.

There is another feature of this bill that I think deserves attention, and that is that it creates a presumption for certain types of crimes to be tried in military tribunals rather than in civilian courts. Many of my colleagues are much more familiar with this than I am, but they have come to the floor and noted that 300 individuals who have been accused of terrorist-related crimes have been tried in civilian courts and found guilty, versus 6 in military courts. They have noted that because the FBI is immersed in the process of getting evidence out of individuals, they are masters at it, which helps to explain these 300 convictions versus the 6 in military courts. But the law tonight creates a presumption that they can be tried in a military court under an argument that several of my colleagues have made that simply the military is better at it. But there is not one shred of evidence brought that the military is better and lots of evidence about the sophisticated, experienced, systematic, and successful efforts of the FBI.

Mr. President, I would like to conclude by summarizing that all that we hold dear as Americans in this Constitution about our fair rights as citizens has been trampled on tonight. This has happened twice before in this Chamber, and the Supreme Court has thrown it out twice before. I hope they will find a case that this will put before the Court again because it is the responsibility of the Court to keep taking us back to this document, this Constitution, when we waver from the course it lays out. There should not be a situation that the government can simply assert that the President, no matter what President it is—this

President or any future President, whether it be President Bush, whether it be President Obama, whether it be the next President of the United States or one of five Presidencies into the future—they should not be able to say: You, Joe American, I am calling you an enemy combatant. I am locking you up. I am assigning your defender—your court attorney if you will. I am deciding the rules of evidence. I am deciding if it is going to be secret. And after I conclude that there is enough evidence because of a partial fingerprint, I am locking you up forever, and there is not a damned thing you can do about it.

Brandon Mayfield was locked up, and he might have been locked up forever if this law had been in place. But the FBI made a mistake. The FBI completely botched the fingerprint comparison. It was Spain that brought it to our attention. Spain kept saying: America, you have the wrong guy. America, you have the wrong fingerprint. And it was Spain that found the right match, and it was finally our own system that said: Yes, we made a mistake, and we are setting Brandon Mayfield free. But under what was done tonight, he may never have seen the light of day outside of his prison. That is not right. It is not, absolutely not a contributor to the security of this country to strip away fair rights of due process, to summon the evidence, to confront your accusers and make sure that a just decision occurs.

Mr. President, I yield the floor.

#### RECOGNIZING WORLD AIDS DAY

Mr. DURBIN. Mr. President, today is World AIDS Day, a time for us to reflect on one of the worst plagues the world has experienced. This year also marks the 30th anniversary of the first appearance of the disease in the United States.

For three decades this preventable disease has devastated families and communities around the world. It has killed over 25 million people. But there has been a strong global response from the research community, governments, health workers, and patient advocates to fight this disease and save lives. This battle has yielded notable victories, and I am proud of the leadership the United States has demonstrated in the fight against AIDS.

The number of newly infected people in the world is steadily declining. Successful antiretroviral treatments have saved 2.5 million lives in developing countries. Advancements have been made in HIV testing and prevention, and biomedical innovations have created powerful drugs that can transform AIDS from a death sentence into a more manageable chronic disease. Most recently, promising tests in gene therapies and vaccines are giving researchers renewed hope for a way to prevent the spread of HIV. Some scientists are becoming optimistic about the possibility of a cure.

Despite this considerable progress, however, an estimated 34 million peo-

ple in the world are still suffering from AIDS—5 million more than in 2002. Only about half of them have access to ongoing medical treatment that is essential to making HIV/AIDS a manageable disease.

Today President Obama announced two new initiatives that will enable us to build on our successful efforts to combat HIV/AIDS here in America. First, the United States will commit \$15 million to the Ryan White program, which supports HIV clinics around the country. In addition, we will commit \$35 million to State AIDS drug assistance programs.

I commend the President and his administration on these critical new commitments. They represent the next step in America's first-ever National HIV/AIDS Strategy, which the President introduced in 2010. They remind us that AIDS doesn't just affect people in developing countries—1.2 million people are currently living with HIV/AIDS in the United States, and over 600,000 people here have died from this deadly virus.

Thirty years into this epidemic, the burden of the disease in America continues to be disproportionately borne by gay and bisexual men and people of color. While African Americans represent 12 percent of the U.S. population, they account for almost half of all people living with HIV and half of new infections each year.

In the State of Illinois, over 37,000 people have HIV or AIDS. Eighty-three percent of those people make their homes in Chicago. All of these lives depend upon continued Federal commitment to investment in research and treatments.

There is hope. Organizations such as AIDS Foundation Chicago—the umbrella group for HIV/AIDS groups working in Chicago—are dedicated to eliminating the disease in the United States. The ONE Campaign is a grassroots organization that works closely with African leaders and activists to stop the spread of preventable diseases such as HIV/AIDS. These two groups are examples of the many groups of people of conscience who are working to make HIV/AIDS history. The promising new biomedical research in gene therapies and vaccines gives me hope that we can someday eliminate AIDS and in the meantime improve the lives of those who are affected by it both here and abroad. But these important programs depend upon the Federal Government's will and ability to fund them. Unfortunately, these programs are at risk.

The U.N. recently released a progress report on the global response to AIDS. It said:

Financial pressures on both domestic and foreign assistance budgets are threatening the impressive progress to date. Recent data indicating that HIV funding is declining is a deeply troubling trend that must be reversed for the international community to meet its commitments on HIV.

The Global Fund to Fight AIDS, Tuberculosis, and Malaria—the inter-

national financing institution that invests the world's money into fighting these deadly diseases—has recently announced that the decline in funds is putting the fund in a tough spot. It can't award any new grants until 2014.

As Congress debates the deficit, we should remember that the fight against AIDS has always been a bipartisan effort. It was under the administration of President George W. Bush that PEPFAR—now the Tom Lantos and Henry J. Hyde U.S. Global Leadership against HIV/AIDS, Tuberculosis and Malaria Act—was created. PEPFAR and other notable programs continue to be strengthened under the Obama administration. Today our President reminded us of this historical bipartisan support. He said:

At a time when so much in Washington divides us, the fight against this disease has united us across parties and across presidents. And it shows that we can do big things when Republicans and Democrats put their common humanity before politics.

We need to cut the deficit, but let's be smart about it. The fact is that every dollar we cut from HIV/AIDS research and treatment this year means additional funding will be required the next year and the next. But this is not just about saving taxpayer dollars, as important as that is. Most of all, this is about saving lives. Every dollar not funded this year will exact a horrible toll. Men, women, and children will die who otherwise could have been saved. People who would have lived longer, healthier lives will have to rely on overly burdened programs such as Medicare and Medicaid just to survive. We must not allow that to happen.

Several years ago, I visited a program in Uganda for women who were dying of AIDS. We sat on the porch, and the women showed me scrapbooks they were making. They were gathering together photos, notes, and other bits of memorabilia about their lives so that their children would have some way to remember them after they died. Their children, playing in the yard, had already lost one parent and were now about to be orphaned. As I sat with those mothers, all of Uganda began to feel like a terminal ward of a hospital—an entire nation waiting to die. That is not true anymore. Today, because of discoveries by scientists and the determination of people of conscience, there is hope in Uganda and other desperately poor nations that have been hit hard by the HIV/AIDS pandemic.

There is also hope here at home. The United States continues to demonstrate its leadership in eliminating HIV/AIDS, but we cannot allow our efforts to fail for lack of funding and support. The elimination of HIV/AIDS is one of our most important commitments to the people of this country and the world, and we ought to keep that promise.